

MAR 29 1991

OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

STATE OF CONNECTICUT, ET AL., PETITIONERS

v.

MASHANTUCKET PEQUOT TRIBE

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE

KENNETH W. STARR
Solicitor General

RICHARD B. STEWART
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

EDWARD J. SHAWAKER

BLAKE A. WATSON
Attorneys

*Department of Justice
Washington, D.C. 20530
(202) 514-2217*

QUESTION PRESENTED

1. Whether the State of Connecticut, which permits certain games of chance to be played under specified conditions, is required by the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. 2701 *et seq.*, to enter into negotiations with respondent Mashantucket Pequot Tribe concerning the conditions and limitations under which the Tribe may operate similar games of chance on its Reservation in Connecticut.

2. Whether a State, which is required by IGRA to negotiate about a possible Tribal-State gaming compact "upon receiving such a request" from a Tribe, 25 U.S.C. 2710(d)(3)(A), may nonetheless refuse to enter into negotiations until the Tribe adopts an ordinance authorizing the type of gaming it proposes to conduct.

TABLE OF CONTENTS

	Page
Statement	1
Discussion	9
Conclusion	19

TABLE OF AUTHORITIES

Cases:

<i>California v. Cabazon Band of Mission Indians</i> , 480 U.S. 202 (1987)	1, 2, 7, 14, 16
<i>Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin</i> , 743 F. Supp. 645 (W.D. Wis. 1990)	16
<i>Mashantucket Pequot Tribe v. McGuigan</i> , 626 F. Supp. 245 (D. Conn. 1986)	2
<i>New Mexico v. Mescalero Apache Tribe</i> , 462 U.S. 324 (1983)	2
<i>Oneida Tribe of Indians v. Wisconsin</i> , 742 F. Supp. 1033 (W.D. Wis. 1990), appeal pending, No. 90- 3337 (7th Cir.)	15-16
<i>United Keetoowah Band of Cherokee Indians v. Oklahoma ex rel. Moss</i> , No. 87-2797 (10th Cir. Mar. 14, 1991)	9, 15
<i>United States v. Cook</i> , 922 F.2d 1026 (2d Cir. 1991), petition for cert. pending No. 90-1386....	16
<i>United States v. Sisseton-Wahpeton Sioux Tribe</i> , 897 F.2d 358 (8th Cir. 1990)	2, 9, 15

Statutes and regulations:

Act of Aug. 15, 1953, ch. 505, Stat. 588, 18 U.S.C. 1162 (Public Law 280)	1
Indian Gaming Regulatory Act, Pub. L. No. 100- 497, 102 Stat. 2467	2
18 U.S.C. 1166-1168:	
18 U.S.C. 1166 (§ 23, 102 Stat. 2487)	5, 16
18 U.S.C. 1166(c)	5
25 U.S.C. 2701 <i>et seq.</i>	2
25 U.S.C. 2701 (5)	13
25 U.S.C. 2703 (6)	2

IV

Statutes and regulations—Continued:

Page

25 U.S.C. 2703 (7) (A)	2
25 U.S.C. 2703 (7) (C)	2
25 U.S.C. 2703 (8)	3
25 U.S.C. 2704-2709	3
25 U.S.C. 2710 (a) (1)	2
25 U.S.C. 2710 (a) (2)	3
25 U.S.C. 2710 (b)	3
25 U.S.C. 2710 (b) (1) (A)	13
25 U.S.C. 2710 (b) (1) (B)	17
25 U.S.C. 2710 (d) (1)	6, 17, 18
25 U.S.C. 2710 (d) (1) (A)	3, 15, 17
25 U.S.C. 2710 (d) (1) (C)	3, 17
25 U.S.C. 2710 (d) (1) (B)	3, 6, 7, 14, 15, 17
25 U.S.C. 2710 (d) (2) (C)	17
25 U.S.C. 2710 (d) (3) (A)	3, 4, 6, 11, 16, 18
25 U.S.C. 2710 (d) (3) (B)	3
25 U.S.C. 2710 (d) (3) (C)	4
25 U.S.C. 2710 (d) (3) (C) (i)	11
25 U.S.C. 2710 (d) (5)	11
25 U.S.C. 2710 (d) (7)	4
25 U.S.C. 2710 (d) (7) (A) (i)	4
25 U.S.C. 2710 (d) (7) (B) (i)	4
25 U.S.C. 2710 (d) (7) (B) (iii)	4, 5
25 U.S.C. 2710 (d) (7) (B) (iii) (I)	4, 10
25 U.S.C. 2710 (d) (7) (B) (iv)	5, 8, 10
25 U.S.C. 2710 (d) (7) (B) (iv)-(vii)	8
25 U.S.C. 2710 (d) (7) (B) (vi)	5
25 U.S.C. 2710 (d) (7) (B) (vii)	8
25 U.S.C. 2710 (d) (7) (B) (vii) (I)	5, 11
25 U.S.C. 2713-2716	3
Organized Crime Control Act of 1970, 18 U.S.C. 1955	16
15 U.S.C. 1175	16
Conn. Gen. Stat. Ann. § 7-186a(b) (West 1989 & Supp. 1990)	6
Conn. Agencies Regs. § 7-186K-15 (1987)	7

Miscellaneous:

S. Rep. No. 446, 100th Cong., 2d Sess. (1988)	7, 12, 13
---	-----------

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-871

STATE OF CONNECTICUT, ET AL., PETITIONERS

v.

MASHANTUCKET PEQUOT TRIBE

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This Brief is submitted in response to the Court's invitation to the Solicitor General to file a brief expressing the views of the United States.

STATEMENT

1. In *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), the Court held that the State of California could not enforce its gambling laws to bar gambling activities conducted by Indian Tribes on their Reservations, where state law did not prohibit gambling in general or the particular types of gambling at issue (bingo, draw poker, and other card games). The Court held that Public Law 280¹ did not permit application of California's laws to the Tribes' gambling because the

¹ Act of Aug. 15, 1953, ch. 505, 67 Stat. 588, 18 U.S.C. 1162.

State's laws, while regulating gambling, did not prohibit the types in which the Tribes were engaged. 480 U.S. at 207-214. The Court also held that the State's laws regulating gambling were preempted under the special principles applied to state laws affecting Indians, which require a balancing of the respective federal, tribal, and state interests. 480 U.S. at 214-222 (citing *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983)).²

Congress enacted the Indian Gaming Regulatory Act (IGRA), Pub. L. No. 100-497, 102 Stat. 2467, 25 U.S.C. 2701 *et seq.*, in the wake of *Cabazon*, in order to establish a system for regulating gambling activities on Indian lands. IGRA divides gaming in Indian country into three categories. Class I consists of traditional Indian gaming, which is subject to the exclusive jurisdiction of the Tribes. 25 U.S.C. 2703(6), 2710(a)(1). Class II gaming consists of bingo, bingo-related games, and certain non-banking card games (*i.e.*, games such as poker that are played against other players, as distinguished from games such as blackjack that are played against the house). 25 U.S.C. 2703(7)(A).³ An Indian Tribe may engage in or license Class II gaming if (A) it is "located within a State that permits such gaming for any purposes by any person, organization or entity (and such gaming is not otherwise specifically prohibited on Indian lands by Federal law)," and (B) "the governing body of the Indian tribe adopts an ordinance or reso-

² The Court in *Cabazon* cited with approval a district court decision holding that bingo conducted by respondent Mashantucket Pequot Tribe was exempt from regulation by the State of Connecticut because Connecticut's laws governing bingo also were regulatory rather than prohibitory in nature. See 480 U.S. at 210 n.9, 218 (citing *Mashantucket Pequot Tribe v. McGuigan*, 626 F. Supp. 245 (D. Conn. 1986)).

³ Certain banking card games operated on or before May 1, 1988, also are treated as Class II gaming under a special grandfather provision. 25 U.S.C. 2703(7)(C). This grandfather provision was at issue in *United States v. Sisseton-Wahpeton Sioux Tribe*, 897 F.2d 358 (8th Cir. 1990), discussed at page 15, *infra*.

lution" that meets certain statutory standards and that has been approved by the Chairman of the National Indian Gaming Commission established by IGRA. 25 U.S.C. 2710(a)(2) and (b). The Commission must monitor Class II gaming and is authorized to enforce IGRA and tribal ordinances regulating such gaming. See 25 U.S.C. 2704-2709, 2713-2716.

All other types of gaming—including dice, non-grandfathered banking card games, and slot machines—are designated as Class III gaming under IGRA. 25 U.S.C. 2703(8). Class III gaming activities, like Class II activities, are lawful on Indian lands only if "located in a State that permits such gaming for any purpose by any person, organization, or entity." 25 U.S.C. 2710(d)(1)(B). Hence, if the State does not permit "such gaming," that is the end of the matter. However, if "such gaming" is permitted by the State, the Tribe may conduct the particular Class III gaming activity on Indian lands if two further conditions are satisfied: First, like Class II gaming, it must be authorized by an ordinance adopted by the Tribe and approved by the Chairman of the National Indian Gaming Commission. 25 U.S.C. 2710(d)(1)(A). Second, Class III gaming must be "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State" that "is in effect." 25 U.S.C. 2710(d)(1)(C).⁴ The compact is "in effect" when notice of its approval by the Secretary of the Interior is published in the Federal Register. 25 U.S.C. 2710(d)(3)(B).

IGRA contains several provisions pertaining to the negotiation of a Tribal-State compact to govern Class III gaming activities. First, it provides that a Tribe wishing to conduct a Class III gaming activity on Indian lands over which it has jurisdiction shall request the State to negotiate for the purpose of entering into a compact. 25 U.S.C. 2710(d)(3)(A). IGRA then pro-

⁴ By contrast, a Tribe need not negotiate a compact with a State in order to engage in Class II activities.

vides that “[u]pon receiving such a request,” the State “shall negotiate with the Indian tribe in good faith to enter into such a compact.” *Ibid.*

Second, IGRA identifies some of the matters that are subject to negotiation between the Tribe and the State, including “the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity”; “the allocation of criminal and civil jurisdiction between the State and the Indian tribe” for enforcement of such laws and regulations; state assessments to defray the cost of regulation; comparable tribal taxes; and “standards for the operation of such activity and maintenance of the gaming facility, including licensing.” 25 U.S.C. 2710(d)(3)(C).

Third, Congress prescribed procedures to facilitate negotiations and to permit and regulate Class III gaming if the parties do not agree to a compact. 25 U.S.C. 2710(d)(7). Specifically, IGRA authorizes a Tribe to bring an action in federal district court if the State fails to enter into negotiations upon request or to conduct such negotiations in good faith. 25 U.S.C. 2710(d)(7)(A)(i). Such an action may not be brought until 180 days have elapsed after the Tribe made its request. 25 U.S.C. 2710(d)(7)(B)(i). If the court finds that the State has failed to negotiate with the Tribe, the court shall order the State and the Tribe to conclude such a compact within 60 days. 25 U.S.C. 2710(d)(7)(B)(iii). In determining whether the State has negotiated in good faith, the court “may take into account the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities.” 25 U.S.C. 2710(d)(7)(B)(iii)(I).

If the State and Tribe fail to conclude a compact within this additional 60-day period, each must submit to a mediator appointed by the court “a proposed compact that represents their last best offer for a compact.” The mediator then must select the proposed compact that best

comports with the terms of IGRA, other federal law, and the findings and order of the court. 25 U.S.C. 2710 (d) (7) (B) (iv). If the State consents within 60 days to the proposed compact selected by the mediator, it shall be treated as a Tribal-State compact entered into between the State and the Tribe. 25 U.S.C. 2710 (d) (7) (B) (vi). If the State does not consent to the proposed compact selected by the mediator, the Secretary of the Interior, in consultation with the Tribe, shall prescribe procedures under which Class III gaming activities may be conducted on Indian lands over which the Tribe has jurisdiction. The procedures adopted by the Secretary must be consistent with the proposed compact selected by the mediator, the provisions of IGRA, and "the relevant provisions of the laws of the State." 25 U.S.C. 2710 (d) (7) (B) (vii) (I).⁵

2. In March 1989, respondent Mashantucket Pequot Tribe requested the State of Connecticut to enter into negotiations for the purpose of forming a Tribal-State compact to govern Class III games of chance on its Reservation. The State, however, refused to negotiate. Pet. App. 3A, 24A. When the 180-day period passed without conclusion of a compact, the Tribe filed this action, seeking (1) an order directing the State to conclude a compact with the Tribe within 60 days, pursuant to 25 U.S.C. 2710 (d) (7) (B) (iii), and appointing a mediator to resolve any resulting impasse, pursuant to 25 U.S.C. 2710 (d) (7) (B) (iv); and (2) a declaratory judgment that IGRA requires the State to negotiate in good faith

⁵ Section 23 of IGRA, 102 Stat. 2487, added a new criminal prohibition, 18 U.S.C. 1166, which provides that, "for purposes of Federal law, all State laws pertaining to the licensing, regulation, or prohibition of gambling, including but not limited to criminal sanctions applicable thereto, shall apply in Indian Country." This provision assimilating state law as federal law expressly excludes from the definition of "gambling" all Class I gaming, Class II gaming authorized by the National Indian Gaming Commission, and Class III gaming conducted under a compact that has been approved by the Secretary of the Interior and is in effect. 18 U.S.C. 1166(c).

regarding the conduct of Class III gaming on the Reservation. Pet. App. 4A.

The district court granted summary judgment in favor of the Tribe, Pet. App. 23A-38A, and directed the State to enter into good faith negotiations and to conclude a compact governing the conduct of games of chance within 60 days. *Id.* at 37A. The court first rejected the State's assertion that 25 U.S.C. 2710(d)(1) prescribes a sequential process, under which the State need not even enter into compact negotiations in response to a Tribe's request until the Tribe has adopted an ordinance permitting a specific type of Class III gaming and that ordinance has been approved by the Chairman of the Commission. Pet. App. 26A-29A. The court noted that 25 U.S.C. 2710(d)(3)(A) states that, "[u]pon receiving such a request," the State "shall negotiate with the Indian tribe in good faith to enter into such a compact." The court found nothing in the plain language of this provision to suggest that the existence of a tribal ordinance is a condition precedent to negotiations; the only condition, the court explained, is a "request" by the Tribe, which concededly occurred here. Pet. App. 28A.

The district court also held that, under 25 U.S.C. 2710(d)(1)(B), the scope of Class III games of chance proposed by the Tribe—including days and hours of operation and types and size of wagers—is a proper subject of negotiations, because Connecticut permits nonprofit organizations to engage in casino-type games of chance at "Las Vegas nights." Pet. App. 29A-37A. The State acknowledged that it permits "[a]ny nonprofit organization, association or corporation [to] promote and operate games of chance to raise funds for the purposes of such organization," subject to certain limitations and restrictions, such as those on the size of wagers, character of prizes, and frequency of operation. Conn. Gen. Stat. Ann. § 7-186a(b) (West 1989 & Supp. 1990).⁶ But the State contended that it prohibits com-

⁶ Applicable regulations state that permissible games of chance include blackjack, poker, dice, roulette, baccarat, and other common

merical gambling as a matter of criminal law and public policy, and it accordingly argued that any Class III games of chance the Tribe proposes to operate must comply with all state requirements concerning hours of operation and types and size of wagers. Pet. App. 29A-30A, 35A-36A.

The district court held that because the State permits games of chance on "Las Vegas nights," the Tribe's proposal to conduct the same types of games satisfies IGRA's condition that Class III gaming is lawful only if it is "located in a State that permits such gaming for any purpose by any person, organization, or entity." 25 U.S.C. 2710(d)(1)(B). In so ruling, the court applied the regulatory/prohibitory distinction approved by this Court in *Cabazon*, 480 U.S. at 209-212, and held that the games of chance at issue here are not prohibited in Connecticut, but instead are permitted subject to extensive regulation and limitation. Pet. App. 35A-37A.⁷ In the court's view, the legislative history of IGRA further refuted the State's contention that the Tribe's Class III gaming activities must comply with all conditions and limitations that state law imposes on Class III games of chance, because the Senate Report states that days and hours of operation, wage and pot limits, types of wagers, and the capacity of the facility are proper subjects of negotiation between the Tribe and the State. *Id.* at 35A (citing S. Rep. No. 446, 100th Cong., 2d Sess. 14 (1988)).

3. The court of appeals affirmed the judgment of the district court in all respects. Pet. App. 1A-22A. In addition, the court clarified that, regardless of the sincerity

casino games. Pet. App. 35A (citing Conn. Agencies Regs. § 7-186k-15 (1987)).

⁷ The court noted that in *Cabazon*, this Court rejected California's similar contention that because high-stakes, unregulated bingo was prohibited by its criminal laws, California's laws governing bingo were "prohibitory" rather than "regulatory" in nature. Pet. App. 31A-32A (citing *Cabazon*, 480 U.S. at 210-211).

of its motives, "[w]hen a state wholly fails to negotiate, as did Connecticut in the instant case, it obviously cannot meet its burden of proof to show that it negotiated in good faith." *Id.* at 22A. Finally, although the court of appeals held that Connecticut is required by IGRA to enter into negotiations with the Tribe, it expressed no view on what Class III gaming might ultimately be permitted, "necessarily leav[ing] to those negotiations the determination whether and to what extent the regulatory framework under which such games of chance are currently permitted in the State shall apply on the Reservation." *Id.* at 20A.

4. Both the district court and the court of appeals declined to stay the district court's judgment. Pet. 10; Pet. App. 41A-44A. Accordingly, the State and the Tribe engaged in negotiations. When no agreement was reached, each submitted a proposed compact to a mediator, pursuant to 25 U.S.C. 2710(d)(7)(B)(iv). The State chose not to propose a compact containing conditions and limitations on the Tribe's operation of games of chance similar to those imposed by state law on non-profit groups that conduct such games at "Las Vegas nights." Instead, the State proposed to assume licensing and oversight authority, without specific limits on the size, stakes or commercial character of games of chance conducted on the Reservation. Br. in Opp. 8. On October 22, 1990, the mediator selected the compact proposed by the State. Pet. 10.

The State refused to consent, within 60 days, to the compact it had proposed. See 25 U.S.C. 2710(d)(7)(B)(iv)-(vii). As noted above (see page 5, *supra*), IGRA provides that in such circumstances, the Secretary, in consultation with the Tribe, shall prescribe procedures for the conduct of the Class III gaming that are consistent with the proposed compact selected by the mediator (here, the compact proposed by the State), the provisions of IGRA, and relevant provisions of state law. 25 U.S.C. 2710(d)(7)(B)(vii). We have been informed by the

Department of the Interior that the development of such procedures is pending before that Department.

DISCUSSION

The court of appeals correctly interpreted and applied the relevant provisions of the Indian Gaming Regulatory Act in the particular circumstances of this case, and its decision is fully in accord with the decisions of the other courts of appeals that have construed IGRA. See *United States v. Sisseton-Wahpeton Sioux Tribe*, 897 F.2d 358 (8th Cir. 1990); *United Keetoowah Band of Cherokee Indians v. Oklahoma ex rel. Moss*, No. 87-2797 (10th Cir. Mar. 14, 1991), slip op. 14-19, 24-25. Furthermore, the court of appeals held only that the State of Connecticut was required to negotiate in good faith regarding the Tribe's proposal to enter into a Tribal-State compact permitting it to conduct certain Class III gaming on its Reservation; the court did not impose any substantive limitations on the proposals the State might make in the negotiation process. Congress intended the compact-negotiation process to facilitate the elimination of remaining areas of disagreement between States and Tribes with respect to forms of gaming other than those (principally bingo and related games) that were addressed by this Court's decision in *Cabazon*. The decision below fulfills that congressional purpose. Further review therefore is not warranted.

1. Petitioners err in asserting (Pet. i, 14) that the court of appeals has held that IGRA "compel[s]" the State of Connecticut "to stand aside and witness the arrival of casino gambling" on the Tribe's Reservation. To the contrary, the court expressly declined to address "whether and to what extent the regulatory framework under which [casino-type] games of chance are currently permitted in the State shall apply on the Reservation." Pet. App. 20A. The decision below merely requires the State to enter into negotiations on that subject. The negotiation process envisaged by IGRA contains many

provisions for the protection of the State's interests, and it in no way forecloses the possibility that Class III gaming activities might ultimately be permitted on Indian lands only if conducted in circumstances that conform closely to those in which the State permits such gaming by others.

In the first place, a Tribe might voluntarily agree to a compact that calls for compliance with many of the State's restrictions on the proposed Class III gaming. Moreover, if the Tribe and the State do not reach an agreement, the Tribe is entitled to judicial relief under IGRA only if the State has failed to negotiate in good faith. If the State *has* negotiated in good faith, IGRA affords the Tribe no further protection.⁸

Even if the court finds that the State did not engage in good faith negotiations in response to the Tribe's initial request, it must give the State another, 60-day opportunity to reach agreement with the Tribe. If the parties again do not reach agreement—and if the Tribe and State then submit proposed compacts to a mediator—the mediator might select the State's proposal as the one “which best comports with the terms of [IGRA] and any other applicable Federal law and with the findings and order of the court.” 25 U.S.C. 2710(d)(7)(B)(iv). In this very case, for example, the mediator selected the compact proposed by the State, which gives the State licensing and oversight authority. Finally, if the State declines to consent to the compact selected by the mediator, the procedures prescribed by the Secretary for the conduct of Class III gaming within the Tribe's jurisdiction must be consistent not only with the compact se-

⁸ IGRA expressly provides that in determining whether a State is negotiating in good faith, a district court may “take into account the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities.” 25 U.S.C. 2710(d)(7)(B)(iii)(I). As a result, the extent to which a State permits gambling is a relevant factor in judging whether a State that seeks narrow limits on Indian gaming is negotiating in good faith.

lected by the mediator and the provisions of IGRA, but also with “the relevant provisions of the laws of the State.” 25 U.S.C. 2710(d)(7)(B)(vii)(I). Thus, petitioners’ pervasive assertion that the court of appeals’ construction of IGRA entirely overrides the State’s laws and public policies is without merit.

2. Petitioners contend (Pet. 12-17) that the State of Connecticut is entitled under IGRA to subject all Class III gaming by Indian Tribes in the State to the same conditions and limitations under which such gaming is permitted by others under state law. If petitioners were correct, the compact-negotiation process fashioned by Congress would be rendered meaningless, because there would be nothing for the State and the Tribe to negotiate *about*. The court of appeals, however, properly rejected petitioners’ broad submission, holding that IGRA does not entitle the State of Connecticut to refuse to enter into any negotiations over whether, and to what extent, the rules governing proposed Class III gaming conducted by the Tribe may differ from those the State imposes on the same gaming that is conducted by nonprofit groups on “Las Vegas nights.”

a. Petitioners’ position that the State’s substantive laws apply of their own force, and hence are not subject to negotiation under IGRA, conflicts with IGRA’s express provision that it is the negotiated compact—not state law—that “govern[s] the conduct of gaming activities.” 25 U.S.C. 2710(d)(3)(A). To this end, Congress provided in 25 U.S.C. 2710(d)(3)(C)(i) that the extent to which state (or tribal) criminal and civil laws are to be applied to Class III gaming activities on Indian lands is subject to negotiation between the Tribe and the State. Petitioners’ position is also undercut by 25 U.S.C. 2710(d)(5), which provides (emphasis added) :

Nothing in this subsection shall impair the right of an Indian tribe to regulate class III gaming on its Indian lands concurrently with the State, except to the extent that such regulation is inconsistent with,

or less stringent than, *the State laws and regulations made applicable by any Tribal-State compact entered into by the Indian tribe under paragraph (3) that is in effect.*

This provision confirms that although state law has an important role to play in the regulation of Class III gaming, IGRA does not require that every Class III gaming activity on Indian lands must conform to *all* state laws governing that particular activity.

b. Petitioners' contention that the State may turn its back on a negotiation request—and unilaterally impose on tribal games of chance the wager, pot, and operating restrictions it places on charitable "Las Vegas nights"—also is directly refuted by the Senate Report on IGRA, which states (S. Rep. No. 446, *supra*, at 14 (emphasis added)) :

The terms of each compact may vary extensively depending on the type of gaming, the location, the previous relationship of the tribe and State, etc. [25 U.S.C. 2710(d)(3)(C)] describes the issues that may be the subject of negotiations between a tribe and a State in reaching a compact. * * * For example, *licensing issues under clause vi may include agreements on days and hours of operation, wage and pot limits, types of wagers, and size and capacity of the proposed facility.*

Congress thus clearly intended that a State would be required at least to negotiate about such subjects, even where state law already addresses them.⁹

⁹ The Senate Report also explains (at 14) that "States are not required to forgo any governmental rights to * * * regulate class III gaming except whatever they may voluntarily cede to a tribe under a compact." This statement reflects again the congressional intent that the extent to which state law will apply depends upon the negotiations. It does not support the State's position that it may altogether ignore the negotiation process and unilaterally impose state law.

Under petitioners' view, by contrast, a State that wanted to accommodate tribal interests would be barred by *federal* law (IGRA) from entering into any compact that departed even slightly from the conditions under which that State permits the same Class III gaming activity to be conducted by non-Indians. IGRA should not be given such a self-defeating construction.

c. The correctness of the court of appeals' interpretation and application of IGRA is further reinforced by the fact that IGRA codifies both the specific holding in *Cabazon* and the regulatory/prohibitory distinction applied by the Court in *Cabazon* for determining when gaming may be conducted by an Indian Tribe. Specifically, IGRA permits a Tribe to conduct bingo and other Class II gaming if it is in a State "that permits such gaming for any purpose by any person, organization or entity." 25 U.S.C. 2710(b)(1)(A). The Senate Report states with respect to this condition (S. Rep. No. 446, *supra*, at 6) :

[T]he Committee anticipates that Federal courts will rely on the distinction between State criminal laws which prohibit certain activities and the civil laws of a State which impose a regulatory scheme upon those activities to determine whether class II games are allowed in certain States. This distinction has been discussed by the Federal courts many times, most recently and notably by the Supreme Court in *Cabazon*.^[10]

IGRA extends the same approach to Class III gaming by subjecting the allowance of such gaming to precisely the same condition (drawn from *Cabazon*) that is appli-

¹⁰ The congressional intent to codify *Cabazon* is further reflected in the statutory findings, which state, *inter alia*, that "Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity." 25 U.S.C. 2701(5); see Pet. App. 13A.

cable to Class II gaming—namely, that it be “located within a State that permits such gaming for any purpose by any person, organization, or entity.” 25 U.S.C. 2710 (d) (1) (B). However, unlike Class II gaming, which is automatically permitted by IGRA where this condition is satisfied (and where the authorizing tribal ordinance is approved by the Chairman of the Commission), Class III gaming must, in addition, be conducted pursuant to a compact negotiated between the Tribe and the State.

Petitioners contend (Pet. 12) that Connecticut was not required to engage in such negotiations concerning Class III gaming because the requirement that “such gaming” be permitted by state law is not satisfied here. However, petitioners concede (Pet. 9 & n.1) that Connecticut “does permit various forms of legalized gambling,” including a state-operated lottery game, off-track betting, and pari-mutuel wagering on jai alai and greyhound racing. And petitioners further concede (Pet. 13) that “[u]nquestionably, casino type games are conducted under a Las Vegas night permit (i.e., poker, blackjack, roulette, etc.).” See Pet. App. 7A n.5. This case therefore closely resembles *Cabazon*. There, although California did not permit “high stakes, *unregulated* bingo,” the Court concluded that because “California permits a substantial amount of gambling activity, including bingo, and actually promotes gambling through its state lottery,” California “regulates rather than prohibits gambling in general and bingo in particular.” 480 U.S. at 211.

Similarly here, although Connecticut does not permit high stakes, unregulated games of chance that fall within Class III under IGRA, Connecticut “permits a substantial amount of gambling activity, including [Class III games of chance permitted at Las Vegas nights], and actually promotes gambling through its state lottery.” Connecticut therefore “regulates rather than prohibits gambling in particular and [the Class III games of chance permitted at Las Vegas nights] in particular.” Put another way (in the terms of the condition IGRA

imposes on Class III gaming): insofar as the Tribe seeks to conduct games of chance that Connecticut permits at Las Vegas nights, the Tribe's gaming will be "located in a State that permits such gaming for any purpose by any person, organization, or entity." 25 U.S.C. 2710(d)(1)(B).

As the court of appeals pointed out, Pet. App. 14A, the Eighth Circuit reached the same conclusion in construing the identical condition applicable to Class II gaming under 25 U.S.C. 2710(d)(1)(A), observing that "the legislative history reveals that Congress intended to permit a particular gaming activity, even if conducted in a manner inconsistent with state law, if the state law merely regulated, as opposed to completely barred, that particular gaming activity." *United States v. Sisseton-Wahpeton Sioux Tribe*, 897 F.2d 358, 365 (1990).¹¹ Accord, *United Keetowah Band of Cherokee Indians v. Oklahoma ex rel. Moss*, No. 87-2797 (10th Cir. Mar. 14, 1991), slip op. 24-25 (quoting same passage from *Sisseton-Wahpeton*). Thus, the court of appeals' determination that Connecticut regulates rather than prohibits certain Class III games of chance, and that therefore "such gaming" is permitted in the State, is consistent with other cases arising under IGRA. Further review on this issue is not warranted.¹²

¹¹ The Eighth Circuit therefore held that the pertinent laws of South Dakota were regulatory rather than prohibitory in nature, even though the State allowed only "low stakes" blackjack, and that the Tribe could conduct high-stakes blackjack games under the grandfather provision for Class II gaming. See note 3, *supra*.

¹² Petitioners acknowledge that there is no conflict among the circuits on this question, but they assert (Pet. 14-15 & n.4) that this case is deserving of review because several cases are pending in the lower courts that concern the relationship between IGRA and state gambling laws. Only one of those cases is currently pending on appeal, and the issue it presents—whether the lottery games proposed by the Tribe are Class II or Class III gaming—is entirely distinct from the issue presented by this case. See *Oneida Tribe of Indians v. State of Wisconsin*, 742 F. Supp. 1033 (W.D. Wis. 1990),

3. Finally, petitioners contend (Pet. 17-18) that a State has no duty to negotiate with a Tribe about a possible Tribal-State compact unless the Tribe has first adopted, and the Chairman of the Commission has first approved, an ordinance authorizing the particular types of Class III gaming the Tribe proposes to conduct. The courts below correctly rejected this contention. Pet. App. 10A-12A, 26A-29A.

IGRA does not impose the condition precedent that petitioners urge. Under the plain language of the second sentence of 25 U.S.C. 2710(d)(3)(A), the State "shall negotiate" with the Tribe "[u]pon receiving such a request" for compact negotiations.¹³ Thus, a request to ne-

appeal pending, No. 90-3337 (7th Cir.). In *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin*, 743 F. Supp. 645 (W.D. Wis. 1990), also cited by petitioners (Pet. 15 n.4), the court held only that under IGRA, federal criminal law (which assimilates state law through 18 U.S.C. 1166), rather than state criminal law, prohibits Indian gaming that is not authorized by IGRA itself, although the court held on equitable grounds that the Tribe was not entitled to an injunction barring state enforcement of its criminal laws. We understand that negotiations concerning Class III gaming have now begun between the Tribe and State in that case.

The Second Circuit recently held that certain gambling laws of New York law are criminal and prohibitory in nature, rather than civil and regulatory. *United States v. Cook*, 922 F.2d 1026, 1034-1036 (1991), petition for cert. pending, No. 90-1386. That case was a criminal prosecution under the Organized Crime Control Act of 1970, 18 U.S.C. 1955, and 15 U.S.C. 1175, which prohibits possession of certain gambling devices on Indian lands. The defendants contended that New York law is regulatory rather than prohibitory with respect to slot machines, and that 18 U.S.C. 1955 should not be construed to apply where state law is regulatory (an issue this Court left open in *Cabazon*, 480 U.S. at 214). The Second Circuit did not resolve the latter question, because it concluded that New York law was prohibitory as to the defendants' possession of slot machines. In contrast to Connecticut's regulation of the games of chance at issue here, New York flatly *prohibits* slot machines. 922 F.2d at 1035-1036. Moreover, this case arises under IGRA, not 18 U.S.C. 1955 or 15 U.S.C. 1175.

¹³ The first sentence of 25 U.S.C. 2710(d)(3)(A) states that "[a]ny Indian tribe having jurisdiction over the Indian lands upon

gotiate is the only condition precedent specified by the relevant Section of IGRA.

To be sure, 25 U.S.C. 2710(d)(1), upon which petitioners rely (Pet. 17), provides that Class III gaming is not lawful until all of the conditions it lists are satisfied. Those conditions are (A) that a tribal ordinance authorizing such gaming has been adopted by the governing body of the Tribe and been approved by the Chairman of the Commission, (B) that the gaming is located in a State that permits such gaming, and (C) that the gaming is conducted in conformance with a Tribal-State compact that has been approved by the Secretary and is in effect. 25 U.S.C. 2710(d)(1)(A), (B) and (C). But contrary to petitioners' contention, nothing in these conditions suggests that they must be satisfied in the sequence in which they are listed—*i.e.*, that the Tribe must adopt (and the Commission Chairman must approve) an authorizing tribal ordinance before the Tribe and the State may agree to a compact and the Secretary may approve that compact.

As the court of appeals pointed out, petitioners' argument that the conditions in 25 U.S.C. 2710(d)(1) must be satisfied sequentially is undercut by the fact that what would seem to be a threshold requirement—that the gaming would be in a State that permits "such gaming"—is listed *second*. See Pet. App. 12A. Petitioners' position is also inconsistent with 25 U.S.C. 2710(d)(2)(C), which provides that "[e]ffective with the publication * * * of an ordinance or resolution adopted by the governing body of an Indian tribe that has been approved by the Chairman * * *, class III gaming activity on the Indian lands shall be fully subject to the terms and con-

which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities." This sentence likewise does not condition the ability of a Tribe to request a State to enter compact negotiations upon the existence of an enacted and approved tribal ordinance.

ditions of the Tribal-State compact entered into * * * by the Indian tribe *that is in effect*" (emphasis added). As the court of appeals pointed out, this provision appears to assume that consummation of the compact will *precede* adoption and approval of the implementing tribal ordinance, Pet. App. 11A—just as approval of a treaty or interstate compact will usually precede enactment of implementing legislation by Congress or state legislatures.

Moreover, nothing in the listing in 25 U.S.C. 2710(d) (1) of the conditions that must *ultimately* be satisfied in order for the Tribe to conduct Class III gaming in a lawful manner overrides the requirement in 25 U.S.C. 2710(d) (3) (A) that the State at least commence negotiations about a possible compact "[u]pon receiving" a request by the Tribe. And with good reason. It would make little sense to require a Tribe to adopt a gambling ordinance unless and until it knows the types of Class III gaming activities to which the State would agree and the circumstances under which the compact will allow those activities to be conducted. It makes even less sense for the Chairman of the National Indian Gaming Commission to give his formal approval of such an ordinance at a time when there is, as yet, no assurance that the State and Tribe will agree to a compact that would render those activities lawful.

Petitioners contend (Pet. 18) that under the court of appeals' construction, "States may be faced with the prospect that a Tribe, without first examining the issue of permitting gambling upon its tribal lands via the ordinance adoption vehicle, may demand and secure negotiations of the State." This policy argument, however, cannot overcome the plain language of 25 U.S.C. 2710(d) (3) (A), which contemplates that tribal representatives may first negotiate with the State about the nature and scope of Class III activities to be permitted, and then present the negotiated agreement to the governing body of Tribe so that it may enact an ordinance authorizing those activities and providing for any tribal regulation

called for under the compact. Nor does this policy argument have force as a practical matter, since there is no reason to suppose that a Tribe would direct its representatives to engage in negotiations with the State if the Tribe were not at least tentatively committed to conducting gaming activities.¹⁴

In any event, the question whether a Tribe must first adopt an ordinance and then negotiate a Class III gaming compact with a State—or may instead proceed in the reverse order—is not an issue of sufficient importance to warrant review by this Court, particularly in the absence of a conflicting holding by any other court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR

Solicitor General

RICHARD B. STEWART

Assistant Attorney General

LAWRENCE G. WALLACE

Deputy Solicitor General

EDWIN S. KNEEDLER

Assistant to the Solicitor General

EDWARD J. SHAWAKER

BLAKE A. WATSON

Attorneys

MARCH 1991

¹⁴ Petitioners' position also would effectively require the Tribe to make a public disclosure of its negotiating position, while leaving the State free to keep its negotiating position confidential. IGRA should not be construed to require this sort of imbalance in the negotiating process.